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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961
No. 537

HARRY MONFRED, JAMES SPISSLER, SAMUEL MENDELSON, SANDER A. SIEGEL, BENJAMIN M. SIEGEL and ALBERT KING,

Petitioners,

vs.

STATE OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

PETITIONERS' REPLY BRIEF.

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Statement.

Respondent's "Brief in Opposition" underscores the validity of petitioners' reasons relied on for the allowance of a writ of certiorari herein. The opposition brief makes it abundantly clear, it is respectfully submitted, that there are special and important reasons for a review on certiorari of the judgment of the court below.

Petitioners address themselves to respondent's arguments in the order of their presentation.

Questions Presented.

1. The respondent initially "denies" that either the applicable statute or the Rule of this Court "provides jurisdiction for consideration of the instant Petition for Writ of Certiorari" (Resp. Br. 1-2). The tenor of the entire brief, however, indicates that respondent does not doubt the power of this Court to grant review; the burden of respondent's argument is that discretion should not be exercised in petitioners' favor. Respondent's "denial" of jurisdiction, therefore, is without support.

In appealing to the Court to withhold review as a matter of discretion, the respondent's agitated and excited discourse appears to overlook that its appeal is to a *sound judicial discretion,* it is respectfully submitted. Ordinarily, it does not aid judicial determination to intrude extraneous passions into that deliberative area. See, Mr. Justice Brandeis in *Schaefer v. United States,* 251 U. S. 466, at 482-483.

2. Respondent apparently "accepts the substance of the petitioners' questions" (Resp. Br. 2) with some caveats:

> (a) Questions Nos. "1", "5" and "8" (Pet. 2, 4, 5) are "acceptable" to respondent as claims of free speech and press violations under the Constitution, but respondent would compress all these questions into one (Resp. Br. 2-3). With all due deference, petitioners would prefer to have them remain as three separate questions.
>
> Petitioners note that respondent does not dispute that one of the questions properly presented (No. "5") is whether the construction of the Maryland court permitting the prohibitions of the

law to be applied to all publications containing pictures or drawings of "nude or semi-nude women" interspersed with "suggestive sex stories" renders the statute unconstitutional as abridging the freedoms of speech and press guaranteed by the provisions of the First and Fourteenth Amendments to the United States Constitution (Pet. 4).

(b) Respondent states that question No. "2" (Pet. 2-3) is "not a fair statement of the legal position of the Court of Appeals of Maryland in the instant case" (Resp. Br. 2). Respondent does not document this assertion.

The question presented in "2" is whether the standards for judging obscenity as enunicated by the court below to include all writings and pictures in writings without limitation "having a tendency to excite lustful thoughts" run counter to the free speech and press provisions of the Constitution.

The court below noted that the trial court, in applying the *Roth* test for obscenity had concluded that the dominant theme of all the magazines and photographs involved at the joint trial dealt with sex in a manner appealing to prurient interest "in that" they "had a 'tendency to excite lustful thoughts'" (Pet. App. "A" 2).

With respect to the five magazines, the findings of the trial court were held to be "correct" (Pet. App. "A" 5); within the meaning of the statute and the "Roth test", the court below held that the material was "obviously calculated to excite lustful thoughts in the mind of the reader" (Pet. App. "A" 5).

Petitioners respectfully submit, therefore, that question No. 2 in the petition is fairly presented.

In *Roth,* "appeal to prurient interest" was made an essential ingredient for the test for obscenity, but the definitions of the phrase "prurient interest" as they appear in footnote 20 of the opinion (354 U. S. 476, at 487) are in substantial variance. The quoted dictionary definition speaks of "a tendency to excite lustful thoughts"; the American Law Institute defines the term as "a shameful or morbid interest" in nudity or sex. The American Law Institute, of course, is opposed to the "lustful thoughts" test (A.L.I., Model Penal Code Tent. Draft No. 6, 1957, Comments, 10); and Mr. Justice Harlan appears to believe that Mr. Justice Brennan intimated in *Kingsley Books, Inc.* that the American Law Institute formula is the correct standard. (354 U. S. 476, at 500.)

That a federal question of substance is thus presented which has not been, but should be, decided by this Court appears clear, it is respectfully submitted. Material which to the average person appeals to a "morbid or shameful interest" in sex or nudity denotes material which goes substantially beyond community toleration, beyond the limits of candor in depiction or representation of such matters. On the other hand, a great deal of art and literature which undisputedly enjoys the customary freedom of expression may have a "tendency to excite lustful thoughts." The difference between the two tests is therefore of crucial significance in terms of the constitutional guarantees for freedom of speech and press.

(c) Respondent states that question No. "3" (Pet. 3) "inaccurately" characterizes the decision of the court below (Resp. Br. 2). Respondent does not attempt to support this assertion.

The court below plainly declined to limit the application of the statute to hard core pornography. It held that it may be that "the Supreme Court will in time (assuming it has not already done so) declare that only 'hard core pornography' is not protected by the constitution" (Pet. App. "A" 11), but the court below stated that "until the Supreme Court specifically speaks further in this uncertain area, we think we are bound by what we understand the Roth test requires" (Pet. App. "A" 12).

It is submitted that petitioners' question No. "3" fairly presents the issue thus posed by the court below.

(d) Respondents' objection to question No. "4" (Pet. 3-4) is that the question "incorporates an inaccurate assumption," to wit, that "the community" was geographically undefined (Resp. Br. 2). It is argued that petitioners, both at the trial court level and in their brief on appeal to the court below, recognized the geographical area to be the City of Baltimore (Resp. Br. 2).

It is quite true that trial counsel elicited from the prosecution witnesses the admission that publications of a similar type had been on display and sold in Baltimore City for at least five years prior to the arrest of petitioners (Pet. 7). Indeed, the court below accepted this as an uncontradicted fact. "The record shows that publications of a similar type had been on display and sold in the city for at least five years prior to the arrest of the appellants" (Pet. App. "A" 2).

However, both the trial court and the court below, purporting to apply the "*Roth* test," held

that the publications were obscene. *Since the uncontradicted record demonstrates that the contemporary standards of the Baltimore community were not violated*, it follows, it is respectfully submitted, that the writings involved here must have been deemed to violate the standards of some undefined community reflecting the subjective and moral predilections of the court below.

Question No. "4" poses the issue whether such construction and application of the Maryland statute is consistent with the requirements of the First and Fourteenth Amendments.

(e) Respondent urges that question No. "6" (Pet. 4-5) also inaccurately characterizes the decision of the court below (Resp. Br. 2). There is no attempt made by respondent to support this criticism.

It is apparently respondent's view, as appears from its subsequent argument (Resp. Br. 28-29), that the court below did all that it was required to do, as against claims of deprivation of federal rights, when it "perused and examined with care" (Pet. App. "A" 3) the material here involved, and found that the findings of the trial court "were correct" in fact, and right in its conclusion "as to the law" (Pet. App. "A" 5).

Petitioners urge that more than a question of "fact" was presented to the court below; a constitutional judgment was required to be made "of the most sensitive and delicate kind." (354 U. S. 476, at 498.) The issue before the court below was not only the question of what the applicable "law" should be, *i.e.*, the "lustful thoughts" test, or the

"hard core pornography" test, or the "variable obscenity" test. The question which the appellate court was required in addition to decide for itself was whether the ideas contained in these publications were no more than "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" (354 U. S. 476, at 484), or whether they were ideas "utterly without redeeming social importance" (354 U. S. 476, at 484).

The question presented by No. "6" is whether the failure of the court below to make the aforesaid determination constituted an abdication of an essential judicial function required by the specified provisions of the Constitution. (See Pet. 23-25, 34-37.)

(f) Respondent argues that question No. "7" (Pet. 5) is "a heterogenous collection of assumptions, characterizations, and conclusions in the nature of an argument rather than an issue" (Resp. Br. 2).

Although respondent states no more than the aforesaid, petitioners assume from respondent's subsequent argument in its brief that the principal objection here is that while petitioners urge that the record is barren of any evidence of guilt (Pet. 25-28), the respondent is of a contrary view. There does not appear to be any dispute by respondent that if petitioners are correct in their analysis of the record, the question presented here is substantial.

(g) Although respondent does not dispute that questions of the validity of the state statute, as

construed and applied, in the light of the free speech and press guarantees of the First and Fourteenth Amendments are properly presented to this Court (Resp. Br. 3), it asserts that no claim of denial of "due process" can be made a part of the questions presented (Resp. Br. 2).

There is a lengthy written opinion by the highest state court in the case herein (Pet. App. "A", 1-13). It is there stated that petitioners claimed that the material here involved was "not obscene within the meaning of the statute because such materials do not 'as a matter of law' exceed contemporary community standards; and that if the materials were held obscene under the statute, "then the statute violated the First and Fourteenth Amendments to the Constitution of the United States" (Pet. App. "A" 3). Then follows a detailed discussion of the decisions of this Court in *Roth-Alberts, Times Film Corp., One, Inc., Adams Newark Theatre Co., Butler, Kingsley Books, Inc., Kingsley International Pictures Corp.* and *Smith v. California* (Pet. App. "A" 6-11). This is followed by reasons for not adopting the "hard core pornography" test or the "variable obscenity" tests (Pet. App. "A" 11-12) "until the Supreme Court specifically speaks further in this uncertain area" (Pet. App. "A" 12). The opinion concludes by stating: "Applying the Roth test to the censorship power of the State under the provisions of our obscenity statute . . . the convictions should be affirmed . . ." (Pet. App. "A" 12).

The "Fourteenth Amendment" provides that no state shall make or enforce any law which deprives

any person of his liberty or property "without due process of law" (Pet. App. "A" 32). The court below, as against the specific claim, held that the statute as construed and applied did not violate the provisions of the "Fourteenth Amendment". No reason appears, therefore, why petitioners cannot include as "a part of the nine questions propounded" (Resp. Br. 2) a claim that the judgment of the court below deprives petitioners of their liberty and property without due process of law.

(h) The only claim of a denial of equal protection of the laws appears in question No. "9" (Pet. 5-6). The question could not have arisen prior to the decision of the court below because only then for the first time did the court draw a line between the material before it (Pet. App. "A" 3-5). It is claimed in the petition herein (Pet. 37-38) that the line drawn by the court below arbitrarily and capriciously granted immunity from prosecution to certain publications while interdicting others, with a resultant violation of the constitutional provision.

The decision of the court below in the aforesaid respect was thus unexpected, and the claim could not have been made until after rendition of the judgment affirming petitioners' convictions. If nevertheless it be deemed inappropriate to act upon this question without some opportunity afforded the court below in post-judgment proceedings to pass upon the issue, petitioners do not press question No. "9" and consent to its withdrawal.

Statement of the Case.

Respondent accepts the "substance of the Petitioners' statement" (Resp. Br. 3), but not the "characterizations and conclusions of fact," and specifically, the "undue emphasis" on the reasoning of the disssenting opinion and the "inaccurate" statement that the majority opinion repudiated the "variable obscenity test" (Resp. Br. 13).

Petitioners' Statement (pp. 6-10) is copiously documented with references to the record; respondent's remarks on the alleged characterizations and conclusions of fact are not.

Petitioners do not believe, it is respectfully submitted, that they have placed "undue emphasis" on any aspect of Judge Hammond's dissenting opinion (Pet. App. "A" 13-30) by including a one paragraph summary thereof in the Statement (Pet. 9-10).

Contrary to respondent's assertion, petitioners did not state that the court below "repudiated" the "variable obscenity test" (Resp. Br. 3). Petitioners stated that the court below had rejected both the "hard core pornography" and "variable obscenity" tests as standards for judging obscenity (Pet. 9; App. "A" 12). It is true that the court below stated in passing that "since these sales were unquestionably commerical" (Pet. App. "A" 12), a variable obscenity test "could have been applied," but the court concluded that until this Court speaks further, it felt itself "bound" by the *Roth* test (Pet. App. "A" 12). Since the court below declined to adopt the "variable obscenity" test, its conclusion as to the proper application of such test in particular cases is not material to the consideration of the questions presented here, it is respectfully submitted.

Argument.

In replying to respondent's "argument" (Resp. Br. 3-30), petitioners do not purport to pass judgment upon, as beyond petitioners' province, the irrelevant, immaterial and scandalous matter therein contained. Rule 40, subdivision 5. As we understand the object of respondent's "argument," it is to persuade this Court that review of the judgment below should be denied, as against petitioners' federal claims, in the exercise of this Court's discretionary certiorari jurisdiction. In petitioners' view, respondent's "argument" defeats its purpose, it is respectfully submitted.

Petitioners submit that respondent makes crystal clear that substantial federal questions are presented not heretofore determined by this Court. As the principal law officers of the state interpret the opinion of the court below, it is submitted that the case has been decided below in a way not in accord with applicable decisions of this Court.

1. Underlying respondent's entire argument is the view that both courts below applied "the test laid down by this Honorable Court in *Alberts v. California*" (Resp. Br. 4), from which it appears to follow, according to respondent, that claims of denial of federal rights are without substance. This is the process of painting with "a broad brush," of "generalized definitions," of "easy labeling" against which Mr. Justice Harlan warned in *Roth-Alberts* (354 U. S. 476, at 496-498).

The increasing use of the term, the "Roth test," as a talismanic answer to all claims of abridgment of speech and press jeopardizes fundamental freedoms under the Constitution. Unless this Court acts in particular

cases upon claims that the "Roth test" has been used in a manner erosive of constitutional rights, the danger exists that "the censorship power of the State" (Pet. App. "A" 12) will supplant the fundamental law. (See, *Speiser v. Randall*, 357 U. S. 513, 520.)

2. The respondent states that "the parties, as well as the Court, must face the facts" (Resp. Br. 6). Of course, if "facing the facts" is equated with counting the number of exposed portions of a particular part of the anatomy contained in a publication (Resp. Br. 6, 14, 17, 18, 19), respondent has not shirked the task. Apparently believing that the court below did not quote sufficient excerpts from the "suggestive sex stories" contained in the publications, respondent has extended the quotation of lines from the stories contained therein (Resp. Br. 6-21). This has been done because respondent "insists that the Petitioners must candidly face each of the exhibits as a whole" (Resp. Br. 21).

Having thus "faced the facts" as requested by respondent, petitioners assume that respondent will in turn deign to face other facts which appear pertinent. The fact is that mere nudity in and of itself is not obscene, as the court below conceded (Pet. App. "A" 3). The fact is that sex is not obscenity, and merely quoting excerpts from a writing dealing with sex does not make it obscene. *One, Inc. v. Olesen*, 355 U. S. 371, reversing 241 F. 2d 772 (C. A. 9, 1957); *Grove Press, Inc. v. Christianberry*, 276 F. 2d 433 (C. A. 2, 1960), affirming 175 Fed. Supp. 488 (D. C. N. Y. 1959). (See, Pet. 29-34.) The fact is that a writing is not obscene unless it goes substantially beyond customary limits of candor in description or representation of such matters. See, *Smith v. California*, 361 U. S. 147,

at 165-167, 171. (See also, Pet. 31-34.) The fact is that a writing cannot be condemned merely because its theme is "illicit sexual intercourse" (Resp. Br. 30) or offends "the moral standards of our civilization" (Resp. Br. 17). *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684; *Mounce v. United States*, 355 U. S. 180, reversing 247 F. 2d 149 (C. A. 9, 1957).

There is one further "fact" that respondent should face. This additional request is occasioned by respondent's seeming difficulty in understanding why petitioners "were satisfied to present profound arguments on abstract constitutional propositions" instead of "facing the facts" (Resp. Br. 6). There are also rumblings in respondent's brief about Hitler's *Mein Kampf* (Resp. Br. 5) and "the lustful excesses of Rome" (Resp. Br. 24). The fact is that the Constitution of the United States intrudes into every attempt to suppress a writing as "obscene." *Smith v. California*, 361 U. S. 147. It is also to be observed that no responsible historian has ever attributed the downfall of Rome or the Third Reich to the reading of literature "tending to excite lustful thoughts," but it is verifiable that the collapse of both these empires came principally because officials in power trampled on the liberties of their own people and thus undermined the security of the State.

3. The record herein is barren of any evidence that these publications exceeded contemporary community standards (Pet. 26, 29-34). Respondent answers this claim with the following: "*What the community tolerates* and what appeals to the lowest elements *is not to be mistaken for the contemporary community standard*, otherwise the moral standards of our civilization

would be embedded in sand" (Resp. Br. 16-17) (emphasis supplied).

The question of what is meant by "contemporary community standards" has not been, but should be, decided by this Court. In any "obscenity" prosecution, are the standards of a community less than those of the Nation to be used in determining whether a writing should be suppressed? Or if the standards of fifty different states are to be invoked, can the standards of a single city, town, or village decide what the entire State shall read? These questions loom large in the face of the free speech and free press requirements of the Constitution.

Moreover, what constitutes the community in terms of individuals? Respondent rejects notions of "community toleration" as the appropriate standard. It suggests that "the trial judge below must have had some acquaintance with community standards in order to be twice elected as State's Attorney" (Resp. Br. 26) for the City of Baltimore. The respondent thus makes evident, if the petitioners have not, that the standards adopted by the courts below are subjective, vagrant and unconfined. Under such standards, not even a writing "of purest ray serene" is safe, except that writing perhaps which satisfies the moral standards of respondent's "civilization."

4. Throughout its argument, respondent labors frantically to undermine the "hard core pornography" test. The reason is not difficult to discern. If the test enunciated in *Roth-Alberts* encompasses hard-core material, as the Solicitor General termed such material in *Roth-Alberts*, then clearly the material here involved was unlawfully interdicted. Moreover, with such a con-

fining standard, respondent will not be able to suppress "dirty books" (Resp. Br. 5); "stories about prostitutes" (Resp. Br. 5); "provocative sex magazines" (Resp. Br. 24), and all the other writings which the respondent does not "appreciate the necessity for new thinking as a means of insuring progress or testing the continuing validity of pre-existing principles and theories" (Resp. Br. 24).

Respondent construes the opinion of the court below as vesting in prosecutors an unfettered discretion in dealing with material depicting or representing sex or nudity. That is why the questions presented here are so substantial, it is respectfully submitted.

Respondent is unwilling to meet the "hard core pornography" test on the merits. It substitutes a scurrilous attack upon persons, scholars and courts (Resp. Br. 4, 5, 21-22) for reasonable argument. It states: "The English language still recognizes that pornography are stories about prostitutes" (Resp. Br. 5). Petitioners do not repeat here their discussion of the constitutional distinction between the "lustful thoughts" and "hard core pornography" tests as standards for judging obscenity (Pet. 15-19).

Unless hard core pornography, as defined and exemplified by the Solicitor-General in *Roth-Alberts*, is the objective boundary of the test for judging obscenity, the vagrant standards enunciated by the respondent here and made possible by the decision of the court below, will become the means for suppressing constitutionally protected communications.

5. The respondent does not deny that the petitioners here were only engaged in the retail sale of books and magazines in Baltimore City (Pet. App. "A" 1).

Indeed, at the conclusion of the trial of petitioners, the court released petitioners on their own recognizance pending appeal, stating: "These men are all in business and have their ties in Baltimore City, and there being no objection from the State, I will release them on their own cognizance . . ." [Tr. 56, R. 64]. The case here, therefore, does not involve the trial of an "industry" and these petitioners are not engaged in any "commercial exploitation of the morbid and shameful craving for materials with prurient effect."

Respondent urges that these petitioners knew the "contents" of the publications, and that officers discussed with petitioners "the lurid aspects of the books" (Resp. Br. 28). The record references given by respondent [Tr. 18, 19, 29, 36 and 45] do not support its statements. There is no evidence in this record that these petitioners knew the alleged objectionable character of "the suggestive sex stories" in the publications, or that they had even read them. This is a crucial issue. So far as mere nudity is concerned, the court below held that such representation was not the equivalent of obscenity, differing with the trial court. Emphasis was placed by the court below on the language contained in the stories. There is nothing in the record to indicate that these retailers were aware of such alleged objectionable language in the publications, comparable material of which had been sold undisturbed in Baltimore for the prior five years.

The uncontradicted record shows that the standards of the Baltimore community were not exceeded and the respondent makes clear that it considers community standards as the undefined subjective standards of prosecutors and triers of the facts (Resp. Br. 25-26, 28).

There is no proof in the record that these magazines appeal to the prurient interest of the average person. The respondent counters: "There is no need to produce testimony on the obvious and on those matters which are the basis of common knowledge and experience" (Resp. Br. 30), supporting this assertion by a biblical quotation. There is this difficulty in respondent's argument: what is known to a Divine Providence is unfortunately hidden to ordinary Man.

The question as to whether petitioners have been convicted without evidence of guilt is a substantial question in the case herein.

6. Respondent points to the denial of certiorari in *Chobot*, 82 S. Ct. 136. Respondent states that such denial "is a decisive answer to all of the law arguments presented by the Petitioners" (Resp. Br. 23).

This Court has frequently reiterated that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U. S. 482, 490. What is more significant is the manner in which respondent construes the denial of certiorari in *Chobot*. All arguments are answered, asserts respondent, although no answers were given. It is respectfully submitted that unless the substantial issues presented in the petition herein are determined by this Court, the abridgements of the exercise of freedoms of speech and press, and the punishment of innocent individuals, will rise in undue proportion throughout the Nation. It appears plain, it is respectfully submitted, that the safeguarding of the fundamental guarantees should not be left to the self-restraint of local prosecutors.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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